STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 9, 2006
v	No. 251402 Wayne Circuit Court
LAMARR ABDUL BARRON, Defendant-Appellant.	LC No. 02-011466-01 ON REMAND

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In *People v Barron*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 251402) (*Barron I*), we determined that defendant was improperly denied the right to use his last peremptory challenge. Relying on *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998) and *People v Bell (On Reconsideration)*, 259 Mich App 583; 675 NW2d 894 (2003) (*Bell I)*, we determined that the "trial court's miscalculation of defendant's remaining peremptory challenges and subsequent wrongful denial of defendant's right to use his last peremptory challenge constituted error requiring reversal." *Barron I*, slip op at 3. Therefore, we reversed defendant's conviction and remanded the case for a new trial.

In addition to the error concerning the peremptory challenge, we noted that the trial court made two additional errors. First, we indicated that the trial court should not have permitted a police officer to testify concerning the contents of an anonymous tip. Second, we determined that the trial court improperly scored Offense Variable 12 when sentencing defendant. We did not address whether these errors would have warranted reversal on their own, but addressed them only because we found that they were capable of being repeated upon retrial. *Barron I*, slip op at 3.

After issuing our opinion, plaintiff appealed to our Supreme Court. On March 8, 2006, in lieu of granting leave to appeal, our Supreme Court vacated the decision in *Barron I* and remanded the case to this Court for reconsideration in light of *People v Bell*, 473 Mich 275; 702 NW2d 128 (2005) (*Bell II*). *People v Barron*, 474 Mich 1072; 711 NW2d 36 (2006) (*Barron II*). The Court also directed us to reconsider our decision as to the admission of the officer's testimony regarding the content of the anonymous tip. The Court further stated that, because defendant failed to object to the admission of the officer's testimony, it should be reviewed for plain error affecting defendant's substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750;

597 NW2d 130 (1999). Finally, the Court vacated that portion of our opinion dealing with the scoring of OV 12 because any correction in the scoring of this variable would not afford defendant relief. *Id.* at 1072-1073.

In light of the holding in *Bell II*, we conclude that the trial court's failure to afford defendant his last peremptory challenge was harmless error. We also conclude that the erroneous admission of the officer's testimony did not affect defendant's substantial rights. Hence, there were no errors warranting reversal. Consequently, we now affirm defendant's conviction.

Under *Miller* and *Schmitz*, a defendant who was erroneously deprived of peremptory challenges need not demonstrate prejudice in order to obtain a new trial; rather, such errors were deemed to automatically warrant reversal. *Miller*, *supra* at 326; *Schmitz*, *supra* at 531-532; see also *Bell I*, *supra* at 594-597 (discussing *Miller* and *Schmitz*). However, in *Bell II*, our Supreme Court stated that *Miller* and *Schmitz* were no longer binding in light of the current harmless error jurisprudence. *Bell II*, *supra* at 293. The Court explained,

> We arrive at this conclusion by recognizing the distinction between a *Batson*[1] error and a denial of a peremptory challenge. A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal. In contrast, a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension. [*Id.*]

The Court then observed that, since the decisions in *Miller* and *Schmitz*, Michigan's harmless error jurisprudence has evolved a great deal and that a nonconstitutional error does not require automatic reversal. *Id.* at 294. Instead, the Court stated that, where the nonconstitutional error is preserved, it is reviewed for a miscarriage of justice, and, if unpreserved, it is reviewed for plain error affecting substantial rights. *Id.* at 295.

In the present case, the trial court erroneously determined that defendant had exercised all twelve of his peremptory challenges when he had actually only exercised eleven. For this reason, the trial court refused to permit defendant to exercise his last peremptory challenge. *Barron I*, slip op at 1. However, there is no indication on the record that this deprivation implicated *Batson* or otherwise rose to a constitutional level. Therefore, the improper denial of defendant's peremptory challenge is not of a constitutional dimension. *Bell II*, *supra* at 293. Because defendant objected before the trial court, this claim of error was preserved for appellate review. Preserved nonconstitutional error is presumed to be harmless and will not warrant reversal "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. Defendant bears the burden of

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

demonstrating that the error was outcome determinative. *Id.* On appeal defendant failed to identify how the loss of this peremptory challenge altered the outcome of the trial. Therefore, we cannot conclude that this error warrants reversal.

Because we have determined that the trial court's deprivation of defendant's last peremptory challenge was harmless error, we must now determine whether the admission of testimony concerning the content of an anonymous tip constituted error warranting reversal. Because defendant failed to object to the admission of the testimony before the trial court, we will review it for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

As noted in *Barron I*, slip op at 3, it was error for the trial court to permit the admission of the police officer's testimony regarding the content of the anonymous tip. However, this error by itself does not warrant a new trial. At trial, an officer testified that because of an anonymous tip concerning a rape, he went to an area specified by the caller and retrieved a bag of clothing belonging to the complainant. The improper testimony did not implicate defendant nor did it contain any factual details concerning the crime. Because the primary issue before the jury was whether the complainant consented, which was fully explored at trial, we cannot conclude that this testimony affected the outcome of the trial. *Id.* Therefore, it did not amount to error affecting defendant's substantial rights.

For the same reason, we conclude that, even if the failure to object to the admission of this testimony fell below an objective standard of reasonableness, defendant's trial counsel's failure to object did not prejudice defendant. Consequently, it did not amount to ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra